A **TUAN SYED AZAHARI NOH SHAHABUDIN & ANOR**

v.

MING HOLDINGS (M) SDN BHD

B COURT OF APPEAL, PUTRAJAYA
DENIS ONG JCA
TENGKU BAHARUDIN SHAH JCA
AZMEL MAAMOR JCA
[CIVIL APPEAL NO: P-02-962-2002]
C 3 MAY 2007

CONTRACT: *Illegality - Consideration - Allotment of shares - Public listed company - Agreement to transfer Bumiputra rights issue shares to non-Bumiputra - Whether against public policy - Whether null and void* D *and unenforceable - Consideration thereof - Whether void*

COMPANY LAW: *Shares - Allotment of shares - Public-listed company - Bumiputra rights issue shares - Ownership - Shares held in trust for benefit of non-Bumiputra - Whether against public policy - Whether* E *agreement null and void and unenforceable*

In this case, the Chan family, together with their family company, the plaintiff, owned substantial but not majority shares in a public listed company ('Palmco'). Palmco's other shareholders include the family of the first defendant ('Syed', otherwise 'DW1') and his F family company, the second defendant, and one Datuk Yusof Latif and his family and family company. It was not in dispute that, together, the three families had a controlling equity in Palmco. In August 1984, Palmco issued 53,010,000 new rights issue shares of RM1 to be taken up. This apart, it also issued 9,640,000 G Bumiputra special rights issue shares of RM1 each to be taken solely by Bumiputra shareholders ('Bumiputra shares'). The three families were aware that, in order to continue to be in control of Palmco, they needed to take up all the rights issue shares including the Bumiputra shares. The Syed family were however financially H constrained to subscribe to the 3,158,959 units of Bumiputra shares they were eligible to. That being so, to help the Syed family to take up the shares, the Chan family pledged 1,705,000 of the plaintiff's Palmco shares (standing at RM1.80 per share then) to the banks for the necessary loans and finance.

I

The Syed family, *ie*, the defendants, were unable to repay the loans, with the result that the banks force sold the pledged shares thereby causing losses to the plaintiff. Before the High Court, the plaintiff sought for the return of the shares. The defendants argued that the claim must fail, as the pledging of the shares was predicated upon an illegal and unlawful transaction. According to DW1, there was a certain 'Pool Agreement' concluded between the parties whereby, in consideration of the plaintiff pledging its Palmco shares, the defendants agreed to transfer 500,000 of their 3,158,959 Bumiputra shares to the plaintiff and would hold the same in trust for the plaintiff since actual transfer could not be effected on account of the plaintiff's non-Bumiputra status. The Pool Agreement aside, DW1 also alluded to a certain 'Pool Account' kept by the Chan family. The learned judge however ruled that these incriminating evidence should not remain on record, and so had them erased from his record. The learned judge then went on to reject the defendants' story and allow the plaintiff's claim. *Inter alia*, the learned judge held that he could not believe the defendants because: (i) DW1's evidence on the illegal transaction was only based on oral evidence; (ii) adverse inferences ought to be drawn against the defendants for failing to produce the Pool Account and to call Palmco's financial controller ('Hooi') whom DW1 alleged had full knowledge of the illegal transaction; (iii) being a businessman, it was strange that DW1 would decide to go along with the arrangement of Palmco directors, and not dispose off the 3,158,959 Bumiputra shares at a profit; and (iv) DW1 was unable to specify how much of the 500,000 shares were to be allotted by each of the two defendants. The defendants appealed and the issue that arose was whether, on the facts and in the circumstances, the findings of the learned judge aforesaid could be sustained.

Held (allowing the appeal):

Per Azmel Maamor JCA delivering the judgment of the court:

(1) The issue in this appeal is purely on facts, namely whether there was an agreement made between the plaintiff and the defendants that 500,000 of the 3,158,959 Bumiputra shares were to be considered sold to the plaintiff but to be held on trust by the defendants on the plaintiff's behalf. If such agreement existed there should be no doubt that it is contrary to public policy and therefore illegal and unenforceable. (para 18)

(2) It is highly improper of the learned judge to have concluded that DW1 could not produce documentary proof of the Pool Account, when the learned judge himself had ordered for the deletion of the written statement of DW1 that dealt with the subject of the Pool Agreement and Pool Account. Having made the deletion, how then could DW1 bring in evidence of the agreement or accounts? The learned judge had also seriously misdirected himself when he asked that part of DW1's statement to be deleted, as that was a relevant fact to the issue in hand. The written statement of DW1 further showed that a senior member of the plaintiff, one Datuk Chan, was involved in an illegal transaction together with DW1 and Datuk Yusof Latif. This was a material fact which the learned judge ought but omitted to consider in determining whether the alleged illegal agreement existed or not. (paras 23 & 24)

(3) The defendants' failure to call Hooi to give evidence did not warrant the invocation of an adverse inference and nor could it be a ground for rejecting the defendants' story. In the circumstances of the case, it would be utterly suicidal for the defendants to call Hooi to support DW1's contention knowing fully well that Hooi worked for the plaintiff's directors and would definitely give evidence against the defendants. (para 25)

(3a) Likewise, there was no justification to draw an adverse inference against the defendants for not selling the Bumiputra shares. Such conduct of the defendants was consistent with that of a reasonable and considerate person who had received favours and assistance from the plaintiff and was prepared to float and sink together with the Chan family. To reject DW1's explanation thereon also goes against the weight of evidence. It must not be forgotten that it was on the basis of their combined shares that the 3 families were able to continuously control Palmco. This was the *status quo* that the Syed family had faithfully conformed to during the years until recession stepped in in 1989. The idea of selling the shares had never been in the the mind of the defendants. (para 26)

(4) The 1,705,000 Palmco shares commanded a market value of more than RM3 million. That being so, it would be naïve to conclude that the plaintiff, with seasoned businessmen as

directors, had agreed to loan such huge amount of shares to the defendants without any form of consideration whatsoever. Consequently we are unable to agree with the learned judge when he ruled that the loan by the plaintiff to the defendants was without any consideration. That is something that does not happen in the business world. (para 27)

(4a) On the facts, it can only be concluded that the plaintiff was prepared to loan its shares to the defendants to purchase the Bumiputra shares because that would ensure the Chan family continuous control of Palmco, and secondly because they also stood to gain from the transaction, since, as consideration for the assistance, the defendants would transfer to and hold in trust for the plaintiff, 500,000 of their Bumiputra shares. But such arrangements are clearly unlawful as they are completely against public policy. It is cheating the Government and the public at large as to the actual amount of equity owned by Bumiputra shareholders in Palmco. Likewise, the consideration provided is unlawful and void and cannot be enforced in law. (para 27)

(5) The judge also made a material issue on the inability of DW1 to specify how much of the 500,000 shares to be allotted to the plaintiff by each of the two defendants. However, bearing in mind the family relationship between the first and second defendants, we completely fail to see why such allotment becomes necessary. The second defendant is DW1's family company, and consequently in what manner it is to be allotted should not be of concern to the plaintiff so long as it receives the 500,000 shares. Here again the learned judge had misdirected himself. (para 28)

(6) The learned judge had also seriously omitted to consider, in determining whether the plaintiff's claim was genuine or otherwise, the fact that the plaintiff took almost six years before asking for repayment of its loan from the defendants. (para 27)

Bahasa Malaysia *translation of headnotes*

Keluarga Chan dalam kes ini, bersama-sama dengan syarikat keluarga mereka, plaintif, adalah pemegang saham terbesar, walaupun bukan pemegang saham majoriti, sebuah syarikat tersenarai ('Palmco'). Selain keluarga Chan, pemegang saham lain

A Palmco termasuklah keluarga defendan pertama ('Syed' atau 'DW1') dan syarikat keluarga mereka, defendan kedua, serta seorang Datuk Yusof Latif dan keluarga serta syarikat keluarga mereka. Tidak dinafikan bahawa ketiga-tiga keluarga ini, secara kolektif, memiliki saham majoriti di dalam Palmco. Pada Ogos 1984,
B Palmco telah menawarkan 53,010,000 saham-saham terbitan baru bernilai RM1 setiap satu. Di samping itu, ia juga mengeluarkan 9,640,000 saham terbitan khas Bumiputra yang ditujukan khusus untuk langganan pemegang-pemegang saham Bumiputra ('saham Bumiputra'). Ketiga-tiga keluarga menyedari bahawa, bagi
C meneruskan kawalan kolektif mereka terhadap Palmco, mereka perlu membeli kesemua saham-saham terbitan yang ditawarkan termasuk saham Bumiputra. Keluarga Syed, namun begitu, tidak mampu untuk melanggani kesemua 3,158,959 saham Bumiputra yang mereka berhak. Maka itu, bagi membantu keluarga Syed,
D keluarga Chan telah menyandarkan 1,705,000 saham Palmco plaintif (bernilai RM1.80 sesaham ketika itu) kepada beberapa bank untuk mendapatkan pinjaman dan dana.

Keluarga Syed, iaitu defendan-defendan, gagal membayar balik
E pinjaman, dan berikutnya pihak bank menjual paksa saham-saham yang disandar sekaligus menyebabkan kerugian kepada plaintif. Di Mahkamah Tinggi, plaintif menuntut pemulangan balik saham-sahamnya. Defendan-defendan berhujah bahawa tuntutan seharusnya gagal, oleh kerana sandaran saham-saham adalah di
F asas kepada transaksi yang menyalahi undang-undang. Menurut DW1, terdapat satu 'Pool Agreement' di antara mereka di mana, sebagai balasan kepada plaintif menyandarkan saham-saham Palmco, defendan-defendan bersetuju untuk memindahmilik 500,000 saham Bumiputranya kepada plaintif dan akan memegang saham-
G saham tersebut sebagai amanah disebabkan pindahmilik sebenar tidak dapat dilakukan disebabkan status bukan-Bumiputra plaintif. Selain dari Pool Agreement, DW1 juga membangkitkan tentang suatu 'Pool Account' yang disimpan oleh keluarga Chan. Walaubagaimanapun, yang arif hakim memutuskan bahawa
H keterangan-keterangan yang menyalahi diri ini tidak boleh berada pada rekod, dan dengan itu telah mengeluarkan keterangan-keterangan tersebut dari rekod beliau. Yang arif hakim kemudian menolak cerita defendan-defendan sekaligus membenarkan tuntutan plaintif. Antara lain, yang arif hakim memutuskan bahawa beliau
I tidak dapat mempercayai defendan-defendan kerana: (i) keterangan DW1 berkaitan transaksi tak sah hanya bersandar kepada keterangan lisan semata-mata; (ii) inferens memudaratkan harus

dibuat terhadap defendan-defendan kerana gagal mengemukakan Pool Account dan kerana tidak memanggil pengawal kewangan Palmco ('Hooi') yang DW1 katakan mengetahui sepenuhnya tentang transaksi tak sah itu; (iii) sebagai peniaga, adalah menghairankan bahawa DW1 boleh menyertai rancangan pengarah-pengarah Palmco dan tidak menjual 3,158,959 saham Bumiputranya untuk mendapat keuntungan; dan (iv) DW1 gagal menjelaskan berapakah dari jumlah 500,000 saham itu yang perlu disumbang oleh masing-masing defendan. Defendan-defendan merayu dan isu yang berbangkit adalah sama ada, dalam halkeadaan yang wujud, dapatan-dapatan yang dibuat oleh yang arif hakim di atas dapat dipertahankan.

Diputuskan (membenarkan rayuan)

Oleh Azmel Maamor HMR menyampaikan penghakiman mahkamah:

(1) Isu dalam rayuan ini adalah semata-mata atas persoalan fakta, iaitu sama ada terdapat perjanjian diantara plaintif dan defendan-defendan bahawa 500,000 dari 3,158,959 saham Bumiputra adalah dianggap dijual kepada plaintif tetapi dipegang sebagai amanah oleh defendan-defendan untuk manfaat plaintif. Jika perjanjian sebegitu wujud, maka tidak syak lagi ianya adalah bertentangan dengan polisi awam dan dengan itu tidak sah dan tidak boleh dikuatkuasakan.

(2) Adalah amat tidak wajar bagi yang arif hakim merumuskan bahawa DW1 gagal mengemukakan bukti dokumentari tentang Pool Account sedangkan beliau sendirilah yang mengarahkan supaya kenyataan bertulis DW1 mengenai Pool Agreement dan Pool Account dihapuskan. Setelah membuat keputusan sedemikian, bagaimanakah caranya DW1 boleh mengemukakan keterangan mengenai perjanjian dan akaun-akaun tersebut? Yang arif hakim juga telah tersalah arah akan dirinya bilamana menghapuskan bahagian kenyataan DW1 itu kerana itu adalah satu fakta kepada isu yang berbangkit. Kenyataan bertulis DW1 seterusnya menunjukkan bahawa seorang ahli senior plaintif, Datuk Chan, terlibat dalam transaksi yang menyalahi undang-undang bersama-sama dengan DW1 dan Datuk Yusof Latif. Ini adalah fakta material yang harus dipertimbang tetapi tidak dipertimbang oleh hakim bicara dalam menentukan sama ada perjanjian tak sah berkenaan wujud ataupun tidak.

(3) Kegagalan defendan-defendan memanggil Hooi untuk memberi keterangan tidak mewajarkan pengenaan inferens memudaratkan dan seterusnya tidak boleh menjadi alasan untuk menolak cerita defendan-defendan. Hooi bekerja dengan pengarah-pengarah plaintif, dan dalam halkeadaan yang wujud, memanggil Hooi untuk memberi keterangan bagi menyokong hujah defendan-defendan adalah perbuatan membunuh diri kerana Hooi pasti akan memberi keterangan menentang terhadap defendan-defendan.

(3a) Begitu juga, tiada justifikasi untuk membangktikan inferens memudaratkan terhadap defendan-defendan kerana tidak menjual saham Bumiputra mereka. Tindakan defendan-defendan tersebut adalah konsisten dengan tindakan seorang yang munasabah dan mulia yang telah menerima bantuan dari plaintif dan kerana itu sanggup timbul atau tenggelam bersama-sama dengan keluarga Chan. Menolak penjelasan DW1 mengenai soal ini juga bertentangan dengan arus keterangan. Harus diingat bahawa ketiga-tiga keluarga berjaya meneruskan kawalan mereka ke atas Palmco berdasarkan saham terkumpul mereka. Inilah *status quo* yang dengan setianya dipatuhi oleh keluarga Syed di sepanjang masa sehinggalah musim merosot muncul pada tahun 1989. Dengan kata lain, idea untuk menjual saham tersebut tidak terlintas langsung di fikiran defendan-defendan.

(4) 1,705,000 saham Palmco di sini mempunyai nilai pasaran lebih dari RM3 juta. Oleh yang demikian, adalah dangkal untuk merumuskan bahawa plaintif, yang mempunyai peniaga-peniaga berpengalaman sebagai pengarah-pengarahnya, bersetuju untuk meminjamkan sejumlah saham yang begitu besar tanpa apa-apa balasan pun. Kami tidak dapat bersetuju dengan yang arif hakim bilamana beliau berpendapat bahawa pinjaman oleh plaintif kepada defendan-defendan adalah tanpa cagaran. Itu tidak berlaku dalam dunia perniagaan.

(4a) Atas fakta, konklusi yang boleh dibuat adalah bahawa plaintif bersedia untuk meminjamkan saham-sahamnya kepada defendan-defendan untuk membeli saham Bumiputra kerana itu akan mempastikan bahawa keluarga Chan akan terus dapat mengawal Palmco, dan kedua kerana mereka juga akan dapat keuntungan dari transaksi oleh kerana, sebagai balasan kepada bantuan yang diberi, defendan-defendan akan memindahmilik dan akan memegang sebagai amanah 500,000

saham Bumiputra mereka untuk manfaat plaintif. Apapun, transaksi sedemikian adalah jelas salah di sisi undang-undang kerana bertentangan dengan polisi awam. Ia satu penipuan terhadap Kerajaan dan orang awam tentang jumlah sebenar ekuiti Bumiputra di dalam Palmco. Begitu juga, balasan yang diberi sedemikian adalah tidak sah dan batal dan tidak boleh dikuatkuasakan di sisi undang-undang.

(5) Kegagalan DW1 menentukan berapakah dari jumlah 500,000 saham tersebut yang perlu disumbang oleh masing-masing defendan telah dijadikan satu isu oleh hakim. Bagaimanapun, mengambilkira ikatan keluarga yang wujud di antara defendan pertama dan kedua, kami tidak nampak apakah perlunya pembahagian tersebut. Defendan kedua adalah syarikat keluarga defendan pertama. Oleh itu, cara bagaimana defendan-defendan mahu membahagikan sumbangan mereka masing-masing tidak ada sangkut paut dengan plaintif selagi plaintif mendapat 500,000 saham tersebut. Maka sekali lagi yang arif hakim telah tersalah arah akan dirinya.

(6) Yang arif hakim juga, dalam mempertimbang sama ada tuntutan plaintif merupakan tuntutan yang jujur atau tidak, telah dengan seriusnya gagal mengambilkira bahawa plaintif menunggu hampir enam tahun sebelum mengemukakan tuntutannya itu.

Case(s) referred to:
Onassis and Caloperopoulos v. Vergottis [1968] 2 Lloyd's Report 403 ***(refd)***
Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 133A(1)(b)

For the appellants - Surinder Singh Gill; M/s Ong & Manecksha
For the respondent - Tan Swee Cheng; M/s Cheong Wai Meng & Van Buerle

[Appeal from High Court, Pulau Pinang; Civil Suit No: 22-263-1990]

Reported by WA Sharif

A

JUDGMENT

Azmel Maamor JCA:

[1] There are factual similarities between this appeal and the Civil Appeal No. P-02-964-02 involving the same plaintiff but the defendants in the latter case are Datuk Hj. Mohd. Yusof Latif (Datuk Yusof Latif) and his family company. Since the issues in respect of the two appeals are the same the parties in the Civil Appeal No. P-02-964-02 have agreed, as they did in the court below, to be bound by whatever decision given by this court on this appeal.

Background Facts

[2] The plaintiff (respondent in this appeal) is owned by the Chan family where Datuk Chan Woot Khoon, Chan Koi Koon and Chan Fook Khoon are the directors. The plaintiff together with certain members of the Chan family own substantial but not majority shares in Palmco Holdings Bhd. (Palmco) a public listed company. The 1st defendant, Tuan Syed Azahari bin Noh Shahabudin (Syed) together with his family company (2nd defendant) and other members of the Syed family also owned shares of Palmco. Another Bumiputra, Datuk Yusof Latif, his family company and members of his family also owned shares of Palmco. With the combined shareholdings of the Chan family, the Syed family and the Datuk Yusof Latif family, Palmco was put under the control of the 3 families. When Palmco was established in 1982 the directors were Datuk Chan Woot Khoon, Chan Koi Khoon, Syed (1st defendant) and Datuk Yusof Latif. They continued to be directors up to 1989.

[3] In August 1984 Palmco declared a rights issue of 3 shares for every 5 shares held to its shareholders. There was a total of 53,010,000 new rights issue shares of RM1 to be taken up.

[4] Around and about the same time Palmco also declared Bumiputra special rights issue to be taken solely among the Bumiputra shareholders with a total issue of 9,640,000 shares of RM1 each. On the basis of the shares owned by the Syed family, they would be eligible to take a total of 3,158,959 shares.

[5] It is not in dispute that the relationship between the Chan family and the Syed family as well as Datuk Yusof Latif family was very close indeed with complete trust and cooperation among the 3 families. Hence the appointment of the directors of Palmco from

among members of the 3 families. It must be quite obvious that consequential to the declaration of the rights issue as well as the special rights issue for the Bumiputra shareholders the 3 families would have to take up all the rights issue and the special right issue for Bumiputra shareholders if they wished to continue to be in control of Palmco. So in the meetings held among the members of the 3 families it was agreed that all the entitlement of the rights issue and the Bumiputra special rights issue would have to be taken up. *Status quo* had to be maintained. Otherwise other parties might take over the control of Palmco. It was mainly because of ensuring continued control of Palmco coupled with the prevailing good relationship between the Chan family and the Syed family that the Chan family had agreed to assist the Syed family to take the Bumiputra special rights issue. The nature of assistance offered by the Chan family was not only to source the financial institutions to obtain the financial loan for the purchase of the new shares but also agreed, if required, to pledge their Palmco shares to the banks. The plaintiff claimed that a total amount of 1,705,000 Palmco shares of the plaintiff was pledged to the banks as securities to assist the defendants to obtain the necessary financing of the said new shares. During the time of the rights issue the market price of Palmco shares was RM1.80 per share.

[6] The defendants could have sold the shares after their issue and would have obtained substantial profit but decided not to do so. It goes to say that if any member of the 3 families were to dispose off their shares then the percentage of their shareholding *vis-a-vis* the shareholding of other shareholders would be diluted with a possibility that they would no longer be in control of Palmco. So no sale of shares by members of the 3 families took place until Malaysia experienced a recession in the late 80s resulting in the tumbling down of the price of shares. Consequently the collateral or securities that had been pledged to the banks were force sold by the lending banks and these included the Palmco shares of the plaintiff that were used to assist the defendants to purchase the Bumiputra special rights issue shares.

[7] In this action the plaintiff claimed from the 1st defendant the return of the 490,000 Palmco shares and from the 2nd defendant the return of 1,215,000 Palmco shares.

A **Plaintiff's Case**

[8] Chan Kai Hoon (PW1) a director of the plaintiff gave evidence on behalf of the plaintiff contending that it was at the request of the defendants that the plaintiff pledged its Palmco
B shares amounting to a total of 1,705,000 shares to the banks to assist the defendants to obtain tne loan for their Bumiputra rights issue. Because the defendants failed to repay the loans with the respective banks, the banks force-sold the plaintiff's Palmco shares. In the premise, the plaintiff lost all its Palmco shares. Hence the
C plaintiff claimed from the defendants for the loss of all its Palmco shares.

Defendants' Case

[9] At the hearing Syed (the 1st defendant) contended that it
D was agreed at the meeting among the Palmco directors that the Chan, Syed and Datuk Yusof Latif families cooperate and assist each other to take up their entitlements of the rights issue and the Bumiputra special rights issue in order to continue to be in control of Palmco. Towards this objective the plaintiff agreed to
E obtain bank loans and pledge its Palmco shares as collateral to the banks in order to purchase not only the rights issue shares but also the Bumiputra special rights issue shares and as consideration for assisting the defendants to take up the Bumiputra rights issue the defendant would transfer 500,000 of the 3,158,959 Bumiputra
F special issue shares to the plaintiff. But because they were Bumiputra shares which could not legally be transferred to the plaintiff the defendants agreed to hold the said 500,000 shares in trust for the plaintiff. The plaintiff was agreeable to accept such consideration by the defendants for pledging its Palmco shares to
G the banks.

[10] The defendants contended that such agreement was contrary to public policy and unlawful. As such it was illegal and unenforceable.

H **[11]** The defendants also contended that the provision of the security provided by the plaintiff is contrary to s. 133A(1)(b) of the Companies Act 1965. It was a void transaction by reason of the fact that at the material time the 1st defendant was a director
I of Palmco together with 3 other directors of the plaintiff and as such the plaintiff ought not to have provided any security in favour of the defendants for the said loans.

[12] The defendants also filed a counter-claim seeking for a declaration that the deposit of the plaintiff's Palmco shares with the banks is contrary to the public policy and therefore illegal, void and unenforceable.

Findings Of The High Court

[13] The learned High Court Judge ruled that when the plaintiff pledged its shares for the benefit of the defendants it is an implied term that the defendants would ensure that the shares would be returned to the plaintiff by the banks and if the shares were lost, the defendants would compensate the plaintiff for any loss incurred or would replace those shares. The learned judge allowed the plaintiff's claim against the defendants.

[14] The defendants' defence that there was an agreement that the defendants would give 500,000 shares of the 3,158,959 Bumiputra special issue shares of Palmco as consideration for the assistance given by the plaintiff pledging its Palmco shares in favour of the banks was not acceptable by the learned judge. His reasons for not accepting the defendants' story are as follows:

1. The Defendants did not adduce any documentary evidence to substantiate their allegations, and relied only on oral evidence. The Defendants had failed to produce some account to show the existence of a Pool Account alleged to exist kept by the Chan family;

2. During cross examination of PW1 the Defence Counsel put to PW1 that Hooi Kee Sum the financial controller of Palmco had full knowledge of the illegal transaction. Because the Defendants failed to call Hooi Kee Sum to support their allegation the learned Judge made conclusion that there was no such illegal arrangement;

3. On DW1's contention that he could have sold their Bumiputra special rights issue shares and would have made a reasonable profit but chose not to do so because of the arrangement among the directors of Palmco due to their close relationship with the Chan family it was totally rejected by the learned Judge as he was of the view that the 1st Defendant was a businessman and his primary objective was to make profit. Furthermore since the percentage of the Defendants' shares was only about 2% of the total paid-up capital of Palmco, the Defendants' shares could not have made any impact.

4. Syed (DW1) was also unable to specify how much of the 500,000 Bumiputra shares were to be allotted by each of the two Defendants to Plaintiff especially when in their Defence it was pleaded that the Defendants and the 1st Defendant's wife had jointly taken up 3,158,959 shares. Because of this inability the learned Judge made a conclusion that the Defence story could not be believed.

Findings Of This Court

[15] It is to be observed that this appeal is based purely on facts. The only issue is whether there was in fact an agreement made between the plaintiff and the defendants that 500,000 of the 3,158,959 Bumiputra special rights issue shares allotted to the defendants were to be given to the plaintiff as the consideration for the plaintiff's assistance in pledging its Palmco shares in favour of the banks in order to enable the defendants to obtain the bank loans to purchase the said Bumiputra rights issue shares.

[16] The principle to be followed by appellate court in dealing with appeals purely on issues of facts are well established in the case of *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545 where Gopal Sri Ram JCA said:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. *But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.* (emphasis added).

His Lordship went on to say:

> In a case such as this where the task of the court is to determine where the probable truth of the case lies, one can do no better than to recall to mind the words of Viscount Simon (who was in the majority) in *The 'Eurymedon'* [1942] 73 Llyod LR 217:
>
> > The appellants, therefore, start in this House under the considerable handicap that there are concurrent findings of fact against them. (Which we hasten to add, is not the case here). I am far from saying that in these circumstances the House has no jurisdiction to allow the appeal, but it would need very clear and convincing reasoning to justify us to overthrowing what has already been decided. *If it could be*

> *shown that the course of events affirmed by the learned Judge could not have occurred, that would be an excellent reason for reversing his view – in these mundane happenings there is no more conclusive arguments than non est credendum quia impossible. If the impeached decision were shown to be unwarranted deduction based on faulty judicial reasoning from admitted or established facts, that might lead to its reversal.*
>
> If there were so overwhelming a body of valid testimony for the view that has been rejected that a reasonable man would feel bound to accept it, the appeal would succeed. (emphasis added).

[17] In the same case Mahavev Shanker JCA quoted the dissenting speech of Lord Pearce in the case of *Onassis and Caloperopoulos v. Vergottis* [1968] 2 Lloyd's Report 403 at p. 430:

> The function of a Court of Appeal is to set aside a judgment that should not be allowed to stand because it occasions a substantial wrong or miscarriage of justice. That wrong or miscarriage of justice may consist of a judgment in favour of a wrong party. It may also consist of a failure in the judicial process to which both parties are entitled as of right, namely, the weighing of the respective cases and contentions. Such failure may constitute a wrong or miscarriage of justice even though it may appear that the appellant in the end fail to secure a judgment in his favour: but the fact that the right party seems to have succeeded in the court below will naturally make a Court of Appeal extremely reluctant to interfere, and it would only do so in the rarest cases. Such matters are questions of degree.

[18] As we have stated above the issue in this appeal is purely on facts. The learned judge had quite rightly identified the issue to be decided ie, whether there was an agreement made between the plaintiff and the defendants that 500,000 of the 3,158,959 Bumiputra special rights issue were to be considered sold to the plaintiff but to be held on trust by the defendants on the plaintiff's behalf. If such agreement did exist there should be no doubts that such an agreement is contrary to public policy and is therefore illegal and unenforceable because such transaction can be regarded as cheating and misleading the Government and the public concerning the actual amount of equity owned by Bumiputra shareholders in Palmco.

[19] We propose to examine the reasons given by the learned judge in arriving at his conclusion that there was no such agreement as alleged by the defendants.

[20] Firstly, the learned judge said that the DW1's contention was based only on oral evidence. It was not supported by any documentary evidence. In our view no sensible person would want to commit to writing a transaction which is illegal and unlawful unless the parties are completely ignorant of the law. Such illegal transaction would expose them to criminal actions. The plaintiff's directors with whom DW1 had closely associated were very experienced businessmen and corporate figures and undoubtedly were very familiar with the relevant commercial laws. It would be naive to think that they were ignorant of such laws. To commit such type of illegal agreement in writing would be just like putting their necks on the chopping block.

[21] The learned judge then went on to give adverse inference against the defendants for their failure to produce the so-called "Pool Account". However when perusing the written statement of DW1 (the 1st defendant) the Q & A for No. 23 to 30 which deal with the subject of Pool Agreement, we noticed that they had been deleted. On our query as to why they were deleted at the court below, the counsel for the defendants (appellants in this appeal) said they were deleted at the insistence of the learned judge who threatened that if that part of the statement was not withdrawn he would lodge a report to the relevant authorities. Because of such insistence by the learned judge that portion of DW1's statement was eventually deleted. Such being the scenario how then could DW1 bring evidence of the Pool Account when the learned judge himself insisted on the deletion of the evidence pertaining to the Pool Agreement.

[22] As recorded in the notes of evidence it would appear that DW1 was initially very reluctant to delete those parts of his evidence, based on the followings:

> Q. See Q/A 23, 24, 25 and 26. You are aware you are making defamatory statements against my client and his brother, Dato' Robert Chan.
>
> A. I'm stating a fact.
>
> Q. I put it to you that there is no pool account or football pool account as alleged by you?
>
> A. I don't agree. I can produce some accounts that will show the existence of those accounts.
>
> Q. But it is not before this Court?

A. Not at the moment.

Q. Are you confessing to this Court that you and Datuk Latif participated insider trading in Palmco shares and thereby committed a criminal offence?

Before DW1 could give his answer to that question the court made the insistence to delete that part of DW1's statement.

Hence the hearing was adjourned to another day (8 February 2002). And at the continued hearing on 8 February 2002 it was recorded "By consent, counsel for the defendants wishes to delete Q/A 23, 24, 25, 26, 27(1) and (iv) and (v), 28, 29 and 30". Before us the counsel for the appellants/defendants informed us that he was forced by the learned judge to delete those parts of DW1's statement. Such information by the appellants' counsel was not denied by the respondent's counsel. We took it that it must be true.

[23] Two things can be inferred from this episode. Firstly, the existence of such "Pool Agreement" could be true having regard to the fact that DW1 was ever willing to expose himself to a criminal action. In answer to a question by the plaintiff's counsel, DW1 said "I am stating a fact" and "I can produce some accounts that will show the existence of those accounts". Secondly, in the light of the court ruling that the evidence on the "Pool Account" be deleted it would be quite obvious to us that the opportunity for DW1 to produce those accounts had been directly deprived by the order of the learned judge. Based on DW1's answers under cross-examination and the subsequent ruling by the learned judge it is highly improper for the learned judge to conclude that DW1 could not produce that piece of documentary proof. The learned judge had also seriously misdirected himself when he asked that part of DW1's statement to be deleted as that would form a relevant fact to the issue in hand. He had further made a wrong conclusion when he drew an adverse inference for DW1's failure to produce documentary evidence on the existence of the Pool Account after insisting that such evidence be deleted.

[24] To show that wrongdoings are not alien to the parties in this suit, PW1 (Chan Koi Khoon), in his written statement, in answer to Q.29 did admit that his brother Datuk Robert Chan Woot Khoon together with DW1 and Datuk Yusof Latif had illegally made use of the names of their secretaries to obtain loans from

A Credit Leasing Corporation Sdn Bhd., a wholly owned subsidiary of Palmco, an act contravening s. 133 of the Companies Act. From the written statement of PW1 it can be inferred that a senior member of the plaintiff, Datuk Chan had been involved in illegal transaction together with DW1 and Datuk Yusof Latif. In B other words directors of the plaintiff would not absolutely distance themselves from committing illegal transactions. This is a material fact which the learned judge had omitted to consider in determining whether such illegal agreement as alleged by the defendants did exist.

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[25] As to the second reason, the learned judge made adverse inference on the failure of the defendants to call Hooi Kee Sum to give evidence to confirm his knowledge of the illegal transaction. In our view it would be utterly suicidal for the defendants to call D Hooi Kee Sum to support DW1's contention knowing fully well that Hooi worked for the plaintiff's directors and he would definitely give evidence against the defendants where the nature of his answer would be purely oral and not documentary. We feel that this failure should not have been used by the learned judge E as a valid ground to arrive at the conclusion which he did.

[26] Thirdly, the learned judge rejected DW1's explanation that he did not sell his Bumiputra special rights issue share immediately after the allotment in view of his willingness to comply with the F arrangement among the Palmco directors on the ground that the judge had concluded DW1 was a businessman with primary objective of maximizing his profit. In our view that action taken by the defendants not to sell those shares was that of a very reasonable and considerate person who had received such favours G and assistance from the plaintiff and was prepared to float and sink together with the Chan family. To reject DW1's explanation would be against the weight of evidence. It must not be forgotten that on the basis of their combined shares the 3 families had been able to continuously control Palmco from 1982 to 1989. This H could only be possible if none of them were not to sell their respective shares. This was what the Syed family had during those years faithfully conformed until the recession stepped in in 1989 when through no fault of the defendants the position had changed. The idea of selling their shares had never been in the I mind of the defendants whose shares though comparatively small were important to supplement the Chan family's shares to enable them to be in control of Palmco. It must be stressed that on the basis of the Chan family's shares only, they would not be able to

be in control of Palmco. Obviously the learned judge had seriously omitted to consider the important impact of the combined shares of the Syed family together with those of Datuk Yusof's family to enable the Chan family to be in control of Palmco. Hence the sale of the shares of the Syed family would certainly defeat such purpose. It would be highly undesired.

[27] Finally, what we consider to be the most glaring fact which the learned judge had seriously omitted to consider in determining whether the plaintiff's claim was genuine or otherwise, is the fact that the plaintiff took almost six years before asking for the repayment of its loan from the defendants. We are dealing with shares of Palmco amounting to 1,705,000 each having a market value of RM1.80 at the relevant time and if converted into money would amount to more than RM3 million. Would seasoned businessmen like the directors of the plaintiff allow such amount of money be kept completely idle for a period of six years? One cannot ignore the fact that such dealing in shares involves certain risks and the amount was huge. Any fair-minded person would definitely want that amount of money to be invested, in order to generate certain income. In our view it would be very naive to conclude that the plaintiff, with seasoned businessmen as directors, had agreed to loan such huge amount of shares to the defendants without any form of consideration whatsoever. It is something which we find it very difficult to accept and could not have happened in the circumstance of this case. There must definitely be some form of consideration given for such generous favour involving great risk. Before us only one form of consideration was contended to have been agreed as stated by the defendant which we consider to be quite probable. We are unable to agree with the learned judge when he ruled that the loan by the plaintiff to the defendants was without any consideration whatsoever. In our view, businessmen like the directors of the plaintiff, would not have agreed to allow such amount of shares to be lent to the defendants thereby exposing such shares to risk without any form of consideration. It is something which does not happen in the business world. Based on the facts of this case we conclude that the plaintiff was prepared to loan its shares to the defendant to purchase the Bumiputra rights issue shares firstly because that would ensure the Chan family continuous control of Palmco and at the same time derive certain benefit from such transaction through the unlawful means of having 500,000 Bumiputra shares of the defendants with the understanding that the Syed family

would hold those shares in trust for the Chan family in return for having received such generous favour. But such arrangements are clearly unlawful as they are completely against public policy. The Government had put serious efforts to ensure Bumiputra participation in the business sector achieves certain ratio. The arrangements in this case had obviously defeated the purpose and objective of the Government policy. It is cheating the Government and the public at large and as such it should be completely discouraged if not punished. It is therefore the duty of this court to ensure that such unlawful act be totally discouraged by declaring it to be unenforceable.

[28] As to the fourth reason, the learned judge made a material issue on the inability of DW1 to specify how much of the 500,000 shares to be allotted to the plaintiff by each of the two defendants. Bearing in mind the family relationship between the 1st and the 2nd defendants we completely fail to see why such allotment becomes necessary. The 2nd defendant is DW1's (defendant No. 1) family company. We fail to see any real need to specify how much each of the two defendants would have to allot their respective portions for the return of the 500,000 shares to the plaintiff. In what manner it is to be allotted should not be a concern of the plaintiff so long as it receives the 500,000 shares. Here again the learned judge had committed a misdirection when he ruled that the defendant's failure to make the allotment was a ground to arrive at the conclusion which he did.

[29] It is our view that the ruling of the learned judge in concluding that there was no such illegal transaction between the plaintiff and the defendants was totally against the weight of evidence and we are unable to agree with him.

[30] In the light of the circumstances mentioned above we arrived at the conclusion that the plaintiff had agreed to give assistance to the defendants to purchase the Bumiputra special rights issue shares with certain consideration. And that consideration was the transfer of the defendants' Bumiputra shares amounting to 500,000 shares out of the 3,158,959 special Bumiputra issue shares allotted to the defendants and the defendants had agreed to hold those shares on trust for the plaintiff. Such consideration is clearly unlawful and void. It cannot be enforced in law.

[31] As regard the defendants' contention that the plaintiff had contravened s. 133A of the Companies Act 1965 having regard to the date of it coming into force on 1 February 1987 and the alleged transaction taking place in 1984 we would agree with the learned judge that s. 133A would not apply. There was no evidence forthcoming from the defendants that the coming into force of s. 133A was during the currency of this legal action, contradicting such ruling. This defence must fail.

[32] In respect of the defendants' counter-claim we agree with the learned judge that it is exactly the same as the defendants' line of defence without any additional fact. It had no merits whatsoever.

[33] We therefore allow the appeal and reverse the decision of the High Court on the basis of our ruling on the earlier defence. We order that costs of this appeal and in the court below to be paid by the plaintiff to the defendants. Deposit is to be refunded.

[34] My learned brothers Denis Ong Jiew Fook and Tengku Baharudin Shah bin Tengku Mahmud JJCA have seen this judgment in the draft and have expressed their agreement with it.